## INDEX


Questions Presented ..... 1
Statement of the Case ..... 2
Brief ..... 3
Authority of Mayor ..... 4
There Is No Constitutional Issue Involved ..... 7
Conclusion ..... 9


## Table of Authorities

### Cases


*Evans* v. *Abney*, 90 S.Ct. 628 (1970) ..... 8
*Karr* v. *Schmidt*, 91 S.Ct. 593 (1971) ..... 8
*Shelby County* v. *Memphis Abstract Co.*, 140 Tenn. 74, 203 SW 339 (1918) ..... 5
*State* v. *City of Spokane*, 330 P2d 718 (Wash. 1958) .... 6


### Constitutional Provisions


United States Constitution
First Amendment ..... 2
Fourteenth Amendment ..... 2


### Statutes


28 U.S.C. Section 1254(1) ..... 7
28 U.S.C. Section 1343(3) ..... 7
42 U.S.C. Section 1983 ..... 7


### City Charter Provisions


Charter of the City of Memphis, Home Rule Amendment, Section 4 ..... 4

# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

WEST TENNESSEE ACLU, ET AL.,
*Petitioners,*

vs.

CITY OF MEMPHIS, TENNESSEE and
HENRY LOEB, Mayor,
*Respondents.*

## REPLY BRIEF OF RESPONDENTS

### QUESTIONS PRESENTED

1. Whether the Mayor of Memphis needs special legislative authority expressly giving him the right to make available on a temporary basis unused office space in City Hall to a non-governmental general welfare corporation as a part of a public service program.

2. Whether the City's refusal to grant City Hall office space to a draft counseling service, where another group is using the space for a purpose designated by the Mayor as being patriotic, deprives the petitioners of any constitutionally protected rights.

## STATEMENT OF THE CASE

The statement of the case set out by the petitioners is satisfactory with the following exceptions:

1. The impression might be gained from the statement of the case of the petitioners that there was a general use of "available space" under the Mayor's program. In fact, the space was one small vacant office. In the event it was needed at any time for city business, it would have been vacated promptly. The space was constricted and the use was temporary.

2. The character of the use or occupancy was such as would accord with a use to celebrate the birthday of Robert E. Lee, or the anniversary of the founding of the American Civil Liberties Union, or an industrial or art exhibit.

3. The Mayor invited members of the public generally to assist and participate in his program which was headquartered in the City Hall space. The basic objective of the program was to aid in a nationwide drive for return of prisoners of war. The Mayor rejected the request of the draft counseling service to use the office space on the ground that it was inconsistent with his conception of his program and its patriotic nature.

## BRIEF

In this case, although three written opinions have been rendered, it has not at any point been adjudicated that the petitioners are entitled to the use of the office space in the Memphis City Hall as a matter of right under the First or Fourteenth Amendments. The strongest indication the District Court made in this respect is set out in the order of April 21, 1972 granting the injunction, in which it was stated in part:

"If such space were lawfully to be made available by the defendants to a group such as 'Memphians for Patriotism', it must be done without unjust discrimination as regards other similarly situated organizations, and under the constitutional requirement of 'equal protection of the laws' under appropriate rules and regulations."

On the other hand, in the original opinion of February 19, 1971 the District Court specifically ruled, under what is presumably to be regarded as the law of the State of Tennessee, that the Mayor of Memphis cannot make unused City Hall office space temporarily available to any organization which does not have a "public" or "governmental" purpose without special legislative authority. This is an uncertain declaration of state law at best.

This issue, which is clearly one of local law and involves the charter authority of the Mayor in the operation and management of municipal property, was not raised in the complaint. The charges made in the complaint related to the deprivation of constitutionally protected rights, and with these charges the District Court did not come to grips either in its opinion of February 19, 1971 or its opinion and order of April 21, 1971.

The Court of Appeals considered the issue a purely local one and dismissed the action under the doctrine of abstention.

It is respectfully pointed out that the Court of Appeals properly applied the doctrine of abstention. The respondents have no quarrel with the authorities cited in the petition bearing upon the doctrine of abstention. It is true that the ruling at the District Court level was apparently based upon the common law, uncertain and erroneous as that ruling may have been, but the key proposition at issue

in this case is the executive authority of the Mayor *under the provisions of a legislative enactment.* This legislative enactment is Section 4 of the Home Rule Amendment to the Charter of the City of Memphis.

**Authority of Mayor**

The Mayor of Memphis is the chief executive officer of the City of Memphis as set out in Section 4 of the Home Rule Amendment to the Charter:

> Be it further ordained, That the Chief Executive Officer of the City of Memphis shall be the Mayor, who shall be vested with and exercise the executive and administrative power of the City, shall be authorized to administer, supervise and control all divisions, boards, agencies, offices and employees of the City and shall see that the ordinances and provisions of the Charter are observed, except as otherwise specifically provided. Such administration shall be conducted by and through divisional directors under the supervision and control of the Mayor, as provided herein. He shall devote his entire time and attention to the duties of his office.

In this case the Mayor did not lease the small unused office space to Memphians for Patriotism, nor did he in any way grant them an interest in the property. They were using the space at sufferance, temporarily, and as an incident of the Mayor's public service program. The testimony at the initial hearing was specific in this respect:

> "Q. Now, Mayor Loeb, this availability of city hall office space that you have given this group is a temporary availability, isn't that true?
> A. Yes, sir.
> Q. They have no lease?
> A. No. None.

Q. They have no property rights in the property? Isn't that correct?

A. Right."

Accordingly, the judgment of the District Court to the effect that the Mayor needed special legislative authority in order to make the unused office space temporarily available to the group was not pertinent, whether right or wrong in the abstract, because the District Court based its ruling upon the power of a municipality to *lease* property.

For example, in the opinion of February 19, 1971 the District Court relied upon the case of *Shelby County* v. *Memphis Abstract Co.*, 140 Tenn. 74, 203 SW 339 (1918), in which the Supreme Court of Tennessee held that statutory authority was necessary for certain officials of Shelby County to lease part of their office space to an abstract company, for the reason that a lease vested an interest in the lessees which could be used effectively to deprive the governing authority of access to its own property. No constitutional issues were involved.

It is submitted that a temporary use of City Hall office space by a group assisting the Mayor with a program having a public purpose is one involving purely discretionary authority on the part of the Mayor.

No persons are granted "rights" under such a simple arrangement. There is no vesting of a property interest of any kind. It is a simple participation by citizens in public affairs, embellished by the connotations and emotions evoked by the expression "patriotism."

This is not a case involving municipal property available for so-called First Amendment purposes. The room in City Hall was not being offered for general public use, or public expression, whereby there could be discrimination by one group *vis a vis* another. The group known as

Memphians for Patriotism was a volunteer organization aiding the Mayor in a definite program which in his judgment was a desirable one and within the scope of his obligations and responsibilities as a public official.

In the District Court the petitioners relied essentially upon authorities in which individuals or organizations have been refused the use of an auditorium, or other type of public forum, which had been made available to others but which was denied to them because of personal beliefs or other constitutionally sanctioned rights.

It is not every denial of the free use of public property that involves a constitutional concept. The courts do not provide the answer to every disagreement between citizens or groups, or every act by a public official. Particularly is this true where an elected official in good faith exercises the discretion vested in him by the authority of his office and violates no federally protected rights such as voting, public education, assembly or the like. In such instances the ballot box provides the appropriate remedy.

The rationale is expressed in the case of *State* v. *City of Spokane*, 330 P 2d 718 (Wash. 1958) which involved a petition for a writ of mandamus to compel certain city commissioners to rent a public coliseum to an amateur hockey team. In supporting the action of the commissioners, the Supreme Court ruled:

> "The petitioners urge that the rejection of the application constituted a denial of equal protection of the laws, in contravention of Art. I, S 12, of the state constitution and the fourteenth amendment of the Federal Constitution. Many authorities are cited, but in each of them some substantial right or privilege of the plaintiff had been affected by discriminatory legislation or administrative action. None of them have

any bearing on the question involved in this case. The petitioners are not attacking any law or ordinance affecting their rights or privileges, and they have not attempted to show wherein they have been given, by the constitution or by statute or ordinance, any right or privilege to contract with the city for the use of its auditorium. Neither the statute nor the ordinance requires that all applicants should be treated equally or accepted on a first-come, first-served basis. Equal treatment is physically impossible, owing to the limitations of space and time inherent in the nature of the enterprise. Whether the best interests of the public would be served would depend entirely upon fortuity of the commissioners were given no discretion to reject early applicants. The commissioners were left free to exercise their judgment in selecting the events to be staged in the auditorium because this was the only way in which a well-rounded program, in keeping with the purposes for which the enterprise was undertaken, could be achieved. *If the public is dissatisfied with the policies which the commissioners follow in programing events, it alone has a right to object and it can make its objections felt at the polls.*" (Italics added)

**There Is No Constitutional Issue Involved**

The petitioners have claimed jurisdiction under 28 USC Section 1343 (3); 42 USC Section 1983; and 28 USC Section 1254 (1). They have not at any point challenged the legality of the Mayor's action under state law or under the charter of the City of Memphis. Further, neither the District Court nor the Court of Appeals has found that the petitioners have any rights under the Constitution of the United States which have been violated. Neverthe-

less, the District Court took jurisdiction of the case and made a ruling on what is purely and intimately a question of local law.

The petitioners themselves do not in their brief appear to make such a point. Rather, on Page 11, they make a general reference to "flagrantly lawless official conduct" and cite a totally inapplicable case.

Recent decisions of this Court have upheld the concept that it is not the purpose of the federal court system to resolve issues involving purely local law, as enunciated by Justice Black in *Karr* v. *Schmidt*, 91 S.Ct. 593 (1971):

> "The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance—the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs."

In *Evans* v. *Abney*, 90 S.Ct. 628 (1970), this Court declined to interfere with a state court determination of Georgia law. The Court stated at page 635:

> "The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations."

## CONCLUSION

This is a case in which the District Judge assumed jurisdiction in an apparent effort to require the Mayor of Memphis to act upon a controversial executive matter in such a way as to conform to what amounted to the District Judge's difference of view with the Mayor as to the appropriate exercise of administrative judgment and authority.

The only relief sought in the complaint was an injunction requiring the Mayor to permit the draft counseling service and the Reverend Mr. Moon to occupy the City Hall space as a matter of constitutional right. The District Court circumvented the gist of the complaint and filed an opinion setting out the Court's version of the local law with respect to *leasing* of municipal property.

Under the circumstances of this case, which have long been moot, there is no basis for a showing that any of the petitioners have a constitutional right to use City Hall office space. Jurisdiction, should it attach at any point, could only be for the purpose of dismissing the complaint.

It is accordingly respectfully submitted that the petition for a writ of certiorari should be denied.

JAMES M. MANIRE
901 First American Bank Building
Memphis, Tennessee 38103
FRIERSON GRAVES, JR.
First National Bank Building
Memphis, Tennessee 38103
*Attorneys for Respondents*

August 3, 1972